WASCO COUNTY PLANNING COMMISSION
March 7, 2017
Meeting begins at 3:00 p.m.
Columbia Gorge Discovery Center
5000 Discovery Dr
Lower Level Classroom
The Dalles, OR  97058

CALL TO ORDER

ROLL CALL
WASCO COUNTY PLANNING COMMISSIONERS PRESENT
   Rus Hargrave
   Brad DeHart
   Vicki Ashley
   Mike Davis
   Lynne Erickson

WASCO COUNTY PLANNING COMMISSIONERS ABSENT
   Andrew Myers
   Chris Schanno
   Jeff Handley

WASCO COUNTY PLANNING OFFICE STAFF PRESENT
   Angie Brewer, Planning Director
   Dustin Nilsen, Senior Planner
   Brenda Jenkins, Planning Coordinator
   Will Smith, Associate Planner
   Kelly Howsley Glover, Long Range Planner

Chair Hargrave called the meeting to order at 3:00

PUBLIC COMMENT
   None

APPROVAL OF MINUTES
   February 07, 2017
   Commissioner Erickson submitted the following corrections to the minutes:
   • On page 2, under the opening of the hearing section, the information is relating to the Deschutes Nena hearing and not the appropriate Wallace hearing.
   • On pages 7, a typo Long Range Planner Kelly Howsley Glover stated that she and Director Brewer wend to the Land ... should be went.
Commissioner Ashley moved to approve the minutes with the corrections listed. Commissioner Davis seconded. Chair Hargrave called for discussion. There was none.

Chair Hargrave called for the vote. The motion was unanimously approved 6 to 0, 2 absent (Commissioner Myers and Commissioner Schanno).

A listing of the vote, as required by Oregon Revised Statute 192.650.c. is as follows:

Chair Hargrave – yes
Vice-Chair Ashley – yes
Commissioner Myers – absent
Commissioner Handley – yes
Commissioner Davis – yes
Vice Chair DeHart – yes
Commissioner Schanno – absent
Alternate Commissioner Erickson – yes
Alternate Position - Vacant

QUASI JUDICIAL HEARING:
File # PLAAPL-16-10-0004 PLAMNS-16-04-0013. Appeal by Scott Hodson of Deschutes Nena, LLC of the Planning Director’s decision to deny a Type 1 application from Deschutes Nena, LLC for the replacement of an accessory structure (pit toilet with an incinerating toilet).

Opening the Hearing by Chair Hargrave: We will now reopen the public hearing on agenda item PLAAPL-16-10-0004, an appeal by Scott Hodson of Deschutes Nena, LLC, of the Planning Director’s decision to deny PLAMNS-16-04-0013, a Type 1 ministerial application to replace and expand an accessory structure.

The property is described as 6S 14E 0, tax lot 4700.

The criteria for approval of this land use decision are contained in the Wasco County Comprehensive Plan, Chapters 2 and 15; and the Wasco County Land Use and Development Ordinance (LUDO), Chapter 1 (Introductory Provisions), Chapter 2 (Development Approval Procedures), Chapter 3 (Basic Provisions) Section 3.210, Exclusive Farm Use Zone, subsections D., F., H., and J., Section 3.910 Natural Area Overlay, and Chapter 10 (Fire Safety Standards).

The proposed development must comply with applicable provisions contained in the Wasco County Comprehensive Plan. Generally, unless otherwise noted, if a request is found to be consistent with the LUDO it is considered consistent with the Comprehensive Plan.

The procedure today:
  a. Disclosure of Interest, Ex Parte Contact or Potential Conflicts
  b. Reading of the Rules of Evidence
  c. Planning department will present their report
d. Those who wish to speak in favor of the proposal

e. Those who wish to speak in opposition of the proposal

f. Rebuttal

g. Close the hearing and record and begin deliberation

h. If enough information is available the Planning Commission will make a decision today.

**Disclosure of Interest, Ex Parte Contact or Potential Conflicts:**

a. Does any planning commissioner wish to disqualify themselves for any personal or financial interest in this matter? There were none. Does any planning commissioner wish to report any significant ex parte or pre-hearing contacts? There were none.

b. Does any member of the audience wish to challenge the right of any planning commissioner to hear this matter? There were none.

c. Is there any member of the audience who wishes to question the jurisdiction of this body to act on behalf of Wasco County in this matter? There were none.

**Planning Commissioner Disclosure of Site Visit**

For the record have any Planning Commissioners conducted a site visit to the subject property? Commissioner Ashley stated that in years past she has been to the property on a trip with the planning commission to a different site in the area.

**Party Recognition**

Anyone can speak for or against the proposal today. However, only those who have “party” status will be able to appeal a decision reached by this commission.

A party is defined in Section 1.090 as:

a. *The applicant and all owners or contract purchasers of record, as shown in the files of the Wasco County Assessor’s Office, of the property which is the subject of the application.*

b. *All property owners of record, as provided in (a) above, within the notification area, as described in section 2.080 A.2., of the property which is the subject of the application.*

c. *A Citizen Advisory Group pursuant to the Citizen Involvement Program approved pursuant to O.R.S. 197.160.*

d. *Any affected unit of local government or public district or state or federal agency.*

e. *Any other person, or his representative, who is specifically, personally or adversely affected in the subject matter, as determined by the Approving Authority.*

If you want party status, please say so at the beginning of your testimony. At the end of the public testimony, the planning commission will deliberate about granting party status to each person who requested it.

**The Rules of Evidence are as follows:**

a. No person shall present irrelevant, immaterial, or unduly repetitious testimony or evidence.

b. Evidence received shall be of a quality that reasonable persons rely upon in the conduct of their daily affairs.

c. Testimony and evidence must be directed toward the criteria applicable to the subject hearing or to criteria that the party believes apply to the decision.

d. Failure to raise an issue with sufficient specificity may preclude raising it before the Land Use Board of Appeals.

e. Failure to raise constitutional or other issues relating to proposed conditions of approval with sufficient specificity to allow Wasco County to respond to the issue precludes an action for damages in circuit court.
Any party of record may request that the record remain open for at least seven (7) days prior to the conclusion of the initial evidentiary hearing.

Failure of persons to participate in the public hearing, either orally or in writing precludes that person's right of appeal to the city council or LUBA. Written testimony submitted prior to the hearing constitutes participation in the hearing.

Chair Hargrave called for the Staff Report. Associate Planner Will Smith gave the following staff report.

Today's hearing is the continuation of an appeal of an Administrative level denial for a Type 1, ministerial decision. The request to staff was for the replacement and expansion of an outhouse accessory building with an incinerating toilet structure in order to comply with public health standards and resolve an outstanding code violation.

Following the continuation of the January Planning Commission Hearing for this appeal, the applicant has continued to work with staff on resolving the issues at play. I will provide you with the staff analysis prepared for the January hearing and then provide you with a summary of new information and a revised staff recommendation to consider for your final decision.

The criteria applied by staff to the original application are contained in the Wasco County Comprehensive Plan, Chapters 2 and 15; and the Wasco County Land Use and Development Ordinance (LUDO), Chapter 1 (Introductory Provisions), Chapter 2 (Development Approval Procedures), Chapter 3 (Basic Provisions) Section 3.210, Exclusive Farm Use Zone, subsections D., F., H., and J., Section 3.910 Natural Area Overlay, and Chapter 10 (Fire Safety Standards).

The property has a unique history. The applicant provided information that demonstrates that the larger building (not the outhouses) was built in 1911 by the railroad and used as a switchman’s quarters until 1932, at which time the railroad began leasing it out. The applicant submitted a 1983 lease identifying it as a “Fishing Cabin” and in 1998 the railroad sold it outright as a 0.6 acre parcel to the men they had been leasing to. It changed hands a few times and in 2012 came into the present ownership under Deschutes Nena, LLC.

The administrative level denial for this application was based on three specific staff findings: 1) that the property is not a legal parcel, 2) that there are unresolved code violations on this parcel precluding Wasco County from approving any land use or development, and 3) that the unlawful use cannot be remedied through a new application under current EPD-7 restrictions.

1) Staff determined the property is not a legal parcel. Our ordinance defines a legal parcel as:

   (Legal) Parcel - A unit of land created as follows:
   a. A lot in an existing, duly recorded subdivision; or
   b. A parcel in an existing, duly recorded major or minor land partition; or
   c. By deed or land sales contract prior to September 4, 1974.

This land was the BNSF right of way, which was leased away by the railroad (possibly as early as 1932, but certainly still just a lease in 1983) and then sold in 1998 by deed. This was the creation of
its present configuration as a 0.6 acre parcel. Because it was created by deed after 1974, staff had
determined that it is not a legal parcel.

**New information:** Staff’s position is that if the planning commission determines the personal
fishing cabin is a lawfully established non-conforming use, the parcel status does not need to be
decided at this time. This is because the subject parcel either is a stand-alone lawful parcel, or
remains part of the RR land for purposes of deciding whether the personal fishing cabin use of the
subject property is a lawful nonconforming use and approving the incinerating toilet. The County
reserves the right to require that the legal status of the property be resolved in the future, such as
if an application for development or a use other than a non-conforming use is filed.

2) Code violations – we cannot approve a use that has outstanding code violations on it –
unless it is application to resolve the violation. Section 1.030 Severability states “shall not
approve a development or use of land has been... developed in violation of this Ordinance....
Unless the violation can be rectified as part of the development proposal.” This proposal
may rectify the nuisance violation relating to the toilet odor and proximity to the river, but
not the unlawful commercial use that is occurring.

a. This application was taken in because the staff member who received it thought it was
resolving the toilet complaint code violation, then it was discovered that it was in
association with an illegal commercial use, and the parcel was illegal, and no remedy
was identified for legalizing the use or parcel.

b. In addition to being an illegal parcel, the bathroom is unlawful because it is used to
support an unlawful commercial use on the parcel.

The original complaint was received in May 2014 identifying an outhouse odor recognizable from
the river. In October 2014, staff research revealed that it was not a legal parcel for the purposes of
development, the owner was notified, and the first request was issued to stop the unlawful
commercial use. In February 2015 Scott, the applicant met with planning staff, compliance staff,
and the applicant’s attorney. The Code Compliance Officer again requested that the commercial
activity cease in May 2015. In December of 2015 this office received pictures of the commercial
use continuing. At that point they were once again directed to the Planning Department for a
resolution.

The applicant submitted a Type 1 application for a replacement of the bathroom structure in April
2016. This did not involve an attempt to legalize, or recognize as legal, the commercial use. This
application was denied by Planning in October 2016 after a long waiting period for a BLM FOIA
request that was an attempt to further determine if there were any identified commercial uses on
this parcel. This denial was accompanied by an Order to Correct from Code Compliance to cease
the commercial operations. Both of these were appealed, one to the Planning Commission, and
the latter to the BOCC.

The commercial guided fishing on this parcel is not lawful, and has not been validated as legal non-
conforming use. There is conflicting testimony between a neighbor’s comment and Taylor Gerath’s
comment on the nature of the commercial use prior to 2012. T. Geraths only claims to know back
to 1994, when it may have been approved, but no application was submitted, thus it was never actually lawfully established, and no “preponderance” of evidence was submitted to show otherwise. Use has been expanded (2014 pictures of two toilets) and altered (2013 aerial imagery of missing toilet) which the applicant claims is the nature of an outhouse in that it needs to be moved around, but this would still require land use and public health approval with health issues so close to the river (100ft). No application was ever received.

New Information: Because it is a civil matter, the County will not be making any determination about trespassing, river access, or lawful access. However, for the purposes of this application, the application must demonstrating access for the purposes of preparing a fire safety plan acceptable to the applicable fire jurisdiction (BIA). If the Planning Commission found that the personal use of the fishing cabin is a lawfully established non-conforming use, and approved the bathrooms to be replaced to support that use, then conditions of approval should be included in that decision to require the cease of any ongoing commercial activities. If they comply, this will resolve the need for a BOC hearing and the Notice of Order to Correct can be rescinded.

3) Unlawful use cannot be remedied through a new application under current EPD-7 regulations

EPD-7 (established in 1985, first mention of Deschutes in 1989) established a “Natural Areas Overlay”. In an appeal to the BOCC from a QJR in 2012, the BOCC upheld PC findings that PLAQR 12-08-0001 (Watson) “must be denied because the proposed use... is a conditional use, not “permitted outright” or “allowed” in the EFU zone (page PC 1-35). The closest possible description of the use occurring on this land is as a private campground which is a Cond. Use., and thus would be prohibited in the EPD-7 overlay areas. It could be Farm Ranch Recreation but for that there needs to be a Farm or Ranch use as primary use, which there is not.

A farm use would be permitted outright in this zone; however this is not a farm use. Staff has state level support from DLCD and OR Dept of Ag with the interpretation that commercial guided fishing is NOT Farm Use. The definition of Farm Use is: “…Farm use also includes the propagation, cultivation, maintenance and harvesting of aquatic, bird and animal species…” In this case, “AND” means not JUST harvesting, also that they have to propagate, cultivate, and maintain in order to establish a Farm Use. This is not occurring.

New information: If the Planning Commission chooses to recognize the personal use of the fishing cabin as a lawfully established non-conforming use, the bathrooms could be replaced to support that use – with conditions of approval that require the cease of all commercial use activities. Nothing precludes the applicant from filing a new application to seek the review of the commercial use as a non-conforming use for future review and decision.

GROUNDS OF APPEAL AND STAFF RESPONSE
The applicant provided seven (7) Grounds for Appeal.

The first Grounds for Appeal claims that “The property’s structures and uses are lawfully nonconforming.” You will notice in the PC report that there are some portions of Chapter 13 (Non-Conforming Uses) addressed. Many of the grounds of appeal discuss this use as a legal non-
conforming use, which it has not been shown to be and for which no application for verification, alteration, or expansion has ever been submitted.

It is very important to note that the application did not include a request for the verification of a non-conforming use and the Director’s decision (Attachment G) did not include an analysis of Chapter 13 requirements or a decision based on that chapter. Given this information, this staff report does not include a comprehensive Chapter 13 review, but addresses the requirements generally in response to the concerns raised in the grounds for appeal. If the applicant wishes to appeal subject to the lawfully established non-conforming use provisions of Chapter 13, he must first apply for a verification of a non-conforming use and receive a decision on that issue. The Planning Commission may however, draw new conclusions based on evidence provided today, and issue an NCU decision if they feel it is appropriate.

The second and fourth Grounds for Appeal states that this approval does not require a legal parcel and “The subject parcel is a legal parcel or part of one”. Our ordinance clearly states that all permitted developments may only occur on legal parcels – as defined by our ordinance. As mentioned before, it may not be necessary to address this issue for this application, for two reasons: (1) the property is either a stand-alone lawful parcel, or (2) remains part of the railroad parcel for purposes of deciding whether the personal fishing cabin and bathroom is a lawfully established non-conforming use. If a new use was proposed, this issue must be resolved.

The third Ground for Appeal states that the Director erred in determining that there was no evidence of existing outhouse or commercial guide use. The lease for the Fishing Cabin did not mention an outhouse and specifically states that no other buildings are permitted, but it is reasonable to assume that some kind of restroom facility has been provided for tenants of the building. The evidence for commercial use comes from the co-owner Taylor Geraths who reports it back to 1994, when it would have been unlawful as well. No evidence was submitted for commercial use when it would have been lawful. A condition of approval should be included in any Planning Commission decision to remove the commercial use; and nothing would preclude them from applying for it as new or an NCU.

The fifth Ground for Appeal states that “The Planning Director erred in concluding that approval of the application is contrary to County policy.” Staff asserts that the toilet is used in conjunction with an unlawful commercial use and as this is unlawful in EPD-7 areas of this zone, that it is contrary to County policy to permit the commercial guided fishing use on this land.

The sixth Ground for Appeal states that guided fishing is a Farm Use. Staff obtained opinions from DLCD and the OR Department of Agriculture in this regard and they agree with Staff’s interpretation that Farm Use “includes the propagation, cultivation, maintenance, and harvesting of aquatic...species”. The “AND” is the crux of that definition. The applicant is merely harvesting and is not propagating, cultivating or maintaining the fish in the Deschutes River, thus commercially guided fishing is not a Farm Use and is not a permitted use in this area.
The seventh Ground for Appeal states that “The guided fishing use is not an illegal business use of the property...” As has been discussed, using this land as a campground for such a business would be a conditional use in A-1, and prohibited in EPD-7 areas of A-1. This it is not lawful. The applicant did not request, nor provide enough evidence to prove, a lawfully established NCU of such an activity exists on this parcel. Staff finds that this is an illegal business use of this parcel. Any decision from the Planning Commission should include a condition of approval to remove the commercial use. Nothing precludes the applicant from applying for an NCU application to provide additional evidence that might support that use.

In regards to fire safety standards – the application stated “Not applicable” for the various access requirements. However, there is an option for “No, see attached fire safety plan”. It IS applicable, there is no access, and there was no fire safety plan submitted. No legal river access, no road on that side of river, high fire risk area during the summer. We recommend that a fire safety plan must be submitted and approved for ANY use on this parcel. This parcel is located within the BIA Fire district and across the river from BLM fire district. We would recommend the applicant work with either agency to produce a fire safety plan for people using this parcel.

CONCLUSION
The three reasons for staff’s initial recommendation to deny were: (1) that this property is not a legal parcel, 2) that there are unresolved code violations on this parcel precluding Wasco County from approving any land use or development, and 3) that the unlawful use cannot be remedied through a new application through current EPD-7 restrictions.) The ordinance clearly states that Wasco County approving authority cannot approve an application on an illegal parcel, that it cannot approve an application on a parcel with an identified violation of the Ordinance, and that the unlawful use of this parcel in association with a commercial fishing guide operation cannot be remedied under current regulations.
Staff recommendation: Uphold the decision of the Director, and deny the Ministerial Type 1 decision for the replacement and expansion of an accessory structure, with the findings in Planning Commission report PLAAPL-16-10-0004 to remain consistent with the Wasco County ordinance requirements for all three points.

In the 60 days since the Planning Commission continued this hearing, staff has been in contact with the applicant’s attorney about potential solutions that would legally work for the County and the applicant. We have retained an attorney, Dan Olsen, for his opinion on the matter is revising our original recommendation based on his input for the Planning Commission’s consideration.

The first impediment to approval is the legal status of the land. Staff finds that this 0.6 acres is not a legal parcel and thus no land use approvals can be issued on it. However, the railroad has a federal exemption that allows the legal sale of portions of their land holdings, which is what happened in 1998 to this piece of land. Thus it was legally sold. However, that does not mean it created a legal parcel according to our ordinance for land use purposes. One interpretation would be that this portion of land may have been legally sold, but the 0.6 acres remained a part of the larger parent legal parcel that the railroad holds. The attorney for the applicant asserts that the 0.6
acres IS a legal parcel on its own right. Our revised recommendation would be to acknowledge that the parcel in some way at least part of a legal parcel, without deciding tonight in which manner it is legal (whether as a part of a larger whole, or on its own), and is thus developable. This does not set a precedent for such an action across the county as a similar transaction of land between private parties would not be a legal sale as they would not have this asserted federal exemption enjoyed by the railroad.

The second impediment to approval is that there are additional unresolved code violations which include the toilet structure, and the commercial use occurring on this property. The approval of the application may resolve the structural issue, while the applicant has agreed to cease all commercial operations on this property beginning on the date of planning commission approval of the toilet replacement. The County has requested a cease and desist of this operation several times since the Wasco County compliance officer contacted the applicant on October 21, 2014. If the applicant wanted to continue the commercial activity later and request the confirmation of the legal status of the “fishing cabin”, they would submit a Non-Conforming Use application in 11 months’ time as a discontinuance of use for 12 months would be considered abandonment. No non-conforming use decision would be made tonight. This would enable the applicant to assemble the full NCU application and would give staff the time to properly review and notice it under appropriate code criteria and advertise the notice of decision to neighboring property owners. This action would not serve to validate a Non-conforming use, but to abate a code nuisance violation. If the applicant were to submit their intent in writing to cease commercial activity immediately, this would resolve this code violation, allowing a land use decision to be applied to the replacement toilet.

The third impediment to approval is that the EPD-7 layer prohibits any new conditional use for this property. Our revised recommendation would not require a new conditional use application. With the applicant abandoning, at least temporarily, their intent to continue commercial use on this property, no conditional use (campground, farm ranch recreation, etc.) would be occurring. This solution would thus acknowledge that the land where the replacement toilet would go is part of a legal parcel, all code violations would be resolved, and no new application would be required. The planning commission would acknowledge that an outhouse has existed on this parcel since 1911 and that it may be replaced with a modification that allows for a healthier, more sanitary, modern version, abating one health violation on the property. This ruling would specify that acknowledging the presence of an outhouse does not permit or consent to the presence of a lawful/legal commercial use. Any such discussion and findings of commercial fishing guide use would be postponed until/if they submit a complete application for a legal non-conforming use at a later date. The ‘fishing cabin’ structure would not be addressed at this time besides the fact that staff has found that this does not meet the legal definition of a dwelling.

If this is the route the PC decides to go this evening, Staff would request that you again continue this hearing to enable staff to rewrite clear and concise findings that reflect the commission’s decision. (See attachment 1 for Alternative Findings and Recommendations submitted by Staff.)
Commissioner Erickson asked what the purpose of having the applicant file for a determination when we know it wasn’t a commercial use at the time. Associate Planner Smith stated that the County has not received the full evidence out there. Filing for determination will allow the applicant to discover and submit additional evidence of the use. Commissioner Erickson asked why the applicant wouldn’t have simply submitted that by now. Associate Planner Smith stated that it wasn’t clear when they applied that would be necessary. The original request was the outhouse to address the odor violation. Director Brewer added that there were actually 2 nonconforming uses on the property. The first is the personal use of the fishing cabin, which seems to have occurred for a long time and is referenced in the staff report. The second nonconforming use is the commercial use for overnight lodging and guests. She wanted to clarify that tonight the request is only for the personal use cabin and not the commercial use. Commissioner Erickson stated that her other question was regarding the conditional of approval prohibiting any compensation of any sort. How would staff monitor that? Associate Planner Smith stated staff would not be able to monitor it precisely but that staff would forbid advertising, we would enforce any complaints in the future, any proof that there was compensation would be a future code violation. He further stated that there is some access issues, however it is a civil trespass issue therefore Staff will not be addressing it tonight, it will need to be settled between neighbors or in civil court. Commissioner Erickson stated that if it were a legally created parcel wouldn’t it need to have access and not be a land locked parcel. Associate Planner Smith stated that yes they do need to have a legal access and that it was part of meeting the fire safety plan, they will need to show access. When we get the fire safety plan approved by the BIA, there will be some resolution of the access issue.

Chair Hargrave stated that it appears the parcel was created legally because the railroad had the right to sell it off, thereby creating the parcel, but at the time the parcel was created it didn’t meet the zoning standard so that is a third compliance issue. Director Brewer stated that based on the guidance Staff has received from legal counsel; the railroad may have some authority to liquidate assets in a manner that is partially exempt from local control. But that appears to be for ownership purposes only. Whether or not it meets our definition for developable is different. Because it is a nonconforming use issue, it technically is not a new use or new development being proposed, it is an alteration or modification of an existing use. Which allows us to acknowledge the fact that the railroad liquidated its assets and based on the information the applicant submits tonight, it is either a standalone legal parcel because of the exemption status the railroad has; or it is part of the previous configuration of the railroad right of way. Chair Hargrave stated that the railroad might have the right to sell it, and they have done that, but selling the parcel off in 1998 created a parcel that did not meet the size requirement and thus creating a code violation. Director Brewer stated that he was right, creating a parcel for development would have been a code violation, she further stated that they could cut off pieces of land, but that did not mean they would be allowed development. Commissioner Ashley stated that the property was in the EFU (Exclusive Farm Use) zone which requires 160 acres for parcels. She agrees with Chair Hargrave that the parcel was a violation. Director Brewer stated that people often divide off property without going through our process, and that doesn’t necessarily mean they are in violation. The violation comes if the property does not meet development standards, if it would not qualify for new uses or new
development. **Commissioner Erickson** stated that when you create a Lot of Record, it has to meet whatever the current requirements are for that zoning district. **Director Brewer** stated that Commissioner Erickson was correct for creating a Lot of Record; however selling off the property did not necessarily create a Lot of Record. **Commissioner Erickson** stated that the lot was recorded. **Director Brewer** stated that anyone can record anything, does not necessarily create a lot of record. She again stated that someone can record anything, but they cannot create a parcel for development outside of compliance. **Commissioner Handley** asked if Director Brewer was saying you can sell off a piece of property. So a rancher could take a ranch house, cut out a 1/6 of an acre and sell that? **Director Brewer** stated that the rancher could sell it, but the person who buys it will not be able to develop it. **Commissioner Handley** asked for clarification that they could sell it and the dwelling would already be there so they could use it. **Director Brewer** stated that in that instance it would still not be a legal parcel by definition. **Associate Planner Smith** stated that the difference is that the Railroad has a federal exemption to be able to sell off their real estate in the manner they see fit, the rancher would not have such an exemption. **Commissioner Ashley** asked how proven is the claim of exemption, or is it going to come back on the County. **Director Brewer** stated that Staff feels more comfortable saying that it is part of the existing right of way property for new development, but it is something that would have to be resolved with more certainty if they came back with a new application for a new use or anything in the future. But because this is a non conforming use issue and no new development or uses proposed other than an alteration to resolve a public nuisance violation, we are able to acknowledge the existing circumstances and resolve the violation, all while knowing if they came back with a new application we would need this clarified. **Commissioner Davis** stated that it sounds like the county is sidestepping one issue and saying later on we will deal with the other issue. **Associate Planner Smith** stated that Staff’s proposal would clean up the one issue and shut down the other issue at this time. The county cannot say they can’t apply for a commercial use in the future, they might never decide to go forward with a commercial use. **Chair Hargrave** stated that in order to approve the request the incinerator toilet has to be accessory to an approved use. The two alternatives seem to be the commercial use or the personal use of the cabin for fishing. He asked if the personal use of the cabin a legal use. **Associate Planner Smith** stated that would be a determination made by the Commission, whether or not they could approve the personal use as a legal non conforming personal use. He further stated that evidence was provided that the cabin has been used as a temporary lodging for personal use fishing cabin since 1932.

**Chair Hargrave** called for other questions from the Commission. There were none. **Chair Hargrave** called for testimony from the Applicant/Representative.

**Wendie Kellington, Attorney for Scott Hodson, Deschutes Nena LLC**

Ms Kellington stated that she was requesting Party Status for her client. She then presented a PowerPoint presentation for the Commission. (See attachment 2 for Ms. Kellington’s PowerPoint). After Ms Kellington’s presentation **Chair Hargrave** asked if they were reserving the right to apply for the non conforming commercial use at a later time. **Ms Kellington** stated that they were reserving that right. **Chair Hargrave** asked for clarification on the rules allowing the railroad to sell its assets, asking if the parcel was a twentieth of the size would it still have been allowed to be sold.
Ms Kellington stated that the railroad sold a twentieth of the parcel with an existing fishing cabin with a pit toilet on it, then you could continue to use it. The federal law allows the federal government to decide that a snapshot of land that it doesn’t need, can be sold off and used in the manner in which it was used. In this case, the property was sold off with 0.31 acres, with a fishing cabin and with an outhouse. That parcel is either lawful all by itself because the railroad has the authority to do that; or its lawful as part of the giant holding. Either way, the lawful parcel issue isn’t one the Commission has to worry about. The Commission can instruct Staff to make a specific finding that the Commission is not making a determination of how the parcel is lawful, it is making a determination that the use is a lawful non conforming use and that the pit toilet can be replaced as an accessory to that use.

Chair Hargrave called for other questions from the Commission. There were none.
Chair Hargrave called for additional testimony in support of the applicant.

Mike McLucas, adjacent property owner
Mr McLucas gave a brief history of the subject property and of his property. He stated that at the time the property was sold by the railroad, it was done with the intent that the fishing cabin use would continue. He also stated that his recall was that the pit toilet had always been on the property.

Chair Hargrave called for questions from the Commission. There were none.
Chair Hargrave called for additional testimony in support of the applicant.

Mark Angel
Mr Angel gave testimony on the history of access of the property. He also gave a brief history of the use of the property. He stated that he has been on the river since 1971 and in 1974 he began work for Wasco Electric and as part of his job, he would go up the river, beyond the locked gate, once a month and read the meters. From 1974 until he left Wasco Electric in 1979 he saw the property every month all year long. He stated that the property has had an outhouse and has been used as a fishing cabin for as long as he has been around. He also stated that this outhouse is one of the furthest located from the river. Commissioner Erickson asked where the locked gate is located. Mr Angel stated that it was approximately 8 miles upriver from Maupin on the east side of the river.

Chair Hargrave called for questions from the Commission. There were none.
Chair Hargrave called for additional testimony in support of the applicant.

Skip Gaphy
Mr Gaphy gave historical information about the use of the property.

Taylor Garret
Mr Garret gave historical information about the use of the property.
Chair Hargrave called for testimony in opposition of the applicant’s request.

Tim Ramis, Attorney representing Finnbelle, LLC

Mr Ramis asked that the hearing be continued to another date or left open to allow for response in writing to the applicant’s testimony. Chair Hargrave asked if seven (7) days would be enough time. Mr Ramis replied that he would prefer two (2) weeks. He then stated that his client does not believe that the application filed by the Applicant is not the correct vehicle to solve the problem with the cabin. He identified the following issues:

- Failure of the proposed site to comply with minimum size requirements
- Already determined to not be a valid parcel – binding decision which was never appealed
- Property has no access by land
- Property has no access to the river – deed from 1998 has no access to river
- WC Planning has a procedure to determine if the fishing guide business is a valid use, but that application has not been submitted

Their stand is to resolve the lot issue first, then move on to the rest of the request.

Requirement of determination that a parcel is legal before any uses can be processed

Second issue is they believe it is possible that the property may not actually have access to the water.

Nonconforming use argument – the cabin is nonconforming and second the outhouse is nonconforming. The county has a procedure to determine this and no determination has been made and no application for determinination has been made.

Chair Hargrave called for questions. There were none.

Director Brewer read # 8 of the alternative findings in answer to the question earlier about the legal status of the property.

Chair Hargrave called for other testimony in opposition

None

Chair Hargrave called for rebuttal.

Wendie Kellington, Attorney for Scott Hodson, Deschutes Nena LLC

Ms Kellington addressed the four concerns of Mr. Ramis.

1 applicant used the wrong form – the right form was used.

2 parcel can’t be legal because it doesn’t have access – the owner from California doesn’t have access either but it is a legal parcel.
Mr Ramis contends parcel can only be legal if you submit the right form?
4 cant be permitted because commercial Fishing can not be agriculture. – but it is the harvesting of fish.

They ask that the record is open for any persons to submit and then a rebuttal period then the opportunity for a final submittal which the staff can use for a findings document.

**Chair Hargrave** closed the hearing to testimony.

5 minute break. @ 530
Reconvened @535

Deliberate on the request to leave the record open.
A consensus was reached by the Commission to hold the record open for 2 weeks for all parties to contribute with a 1 week for rebuttal followed by a 1 week for staff to prepare response.

Continuation of the hearing to a time and date certain. Said time and date being April 18, 2017 at the Gorge Discovery Center, in the Lower Level Classroom, at 3:00pm.

**Chair Hargrave** reopened the hearing for input to the record for the 2 weeks.

Meeting adjourned at 5:11 pm

_______________________________  ________________________________
Rus Hargrave, Chair      Angie Brewer, Planning Director
Wasco County Planning Commission   Wasco County Planning & Development
1. Staff will drop its objection to the Planning Commission making a decision on the NCU determination as part of this appeal. Staff will recommend approval of a nonconforming use of the property as a personal use fishing cabin as that use now exists. Personal fishing cabin use of the property means that the owners and the invited friends and family of the owners stay on the property overnight in the cabin or camp overnight outside, they eat on the property, they stop and rest on the property and in the cabin and they fish from the property.

2. Under the nonconforming personal use of the property, the owners could use the property and cabin and could permit friends and family to use it either with or without the owners being present. But there would be a condition of approval prohibiting any compensation of any sort, including reimbursement of costs/expenses from non-owners to the owners. Staff's position is that the exchange of money is a commercial use and as a practical matter this is the only way to ensure compliance. No use could be sponsored by any commercial fishing guide service. No advertising of the cabin or property for use.

3. If the planning commission accepts that recommendation, then the owners would accept a condition of approval that the cabin and property will be for personal use as described in No 2 above, not for commercial use.

4. The applicant could file for a determination that the fishing cabin has a commercial fishing cabin nonconforming use beginning 11 months from the date the property was last used commercially. The cabin was last used commercially in October 2016 and that use ceased only because the county ordered the applicant to stop. Therefore, applicant would be authorized to apply for a determination that the cabin has a lawful commercial fishing use on or about September 5, 2017. It is the county's position, a position that would be memorialized in the planning commission’s final decision, that so long as an application to verify the nonconforming commercial fishing use is filed on September 5, 2017, that any commercial fishing use of the property is not lost during the period it takes the county to process the nonconforming use application to finality (even though the property would still not be used commercially during this period and more than 12 months from the last commercial use would pass). The County cannot guarantee that this position is legally correct and the applicant bears the risk that LUBA or a court might conclude otherwise. The applicant could also submit an application to alter the personal use fishing cabin to add a commercial fishing use under ORS 215.130(9) and corresponding county rules.

5. Nothing would preclude the applicant from applying for a modification of the NCU or some other approval to add water, electricity, porch or whatever.

6. The applicant is not foreclosed from seeking and obtaining approval for any permitted or conditionally allowed use of the property in the current or some future zone.

7. Staff would recommend approval of the incinerator toilets. This would be approved as both part of the historic NCU as well as an approved modification of the private cabin NCU for health and safety purposes. Two seats are OK if required or recommended by DEQ, otherwise one.

8. Staff's position would be that the planning commission does not need to decide the land use status of the property at this time. The subject parcel either is a stand-alone lawful parcel, or remains part of
the RR land for purposes of deciding whether the personal fishing cabin use of the subject property is a lawful nonconforming use and approving the incinerating toilet. The County reserves the right to require that the legal status of the property be resolved in the future, such as if an application for development or a use other than a non-conforming use is filed.

9. The county will withdraw its Order to Correct and dismiss the enforcement proceedings. Violation (e.g. commercial use in the future) would be subject to renewed enforcement both as an unpermitted use and a violation of conditions of approval of the NCU.

10. The applicant would be required to submit a fire safety plan acceptable to the BIA fire district which covers the area of the subject property.

11. The County would be making no determination about lawful access.

12. The staff will request and applicant will support a request for a continuance to present final findings and conditions for PC approval along these lines.
Scott Hodson - Applicant
Deschutes Nena LLC - Owner

Principals: Scott Hodson, Taylor Garaths
Property consists of .31 acres +/-
Prop purchased for purpose of supporting both personal and guided fishing trips
No access other than via river
Located riverside of RR tracks
Sold per Fed Surface Transportation Act as surplus RR Property – at “Nena” Oregon
Has no possible economically viable use other than fishing cabin with an outhouse
The fishing cabin has always had an outhouse as a necessary accessory to the fishing cabin
Proposal is for a two seat incinerating toilet within single structure – one is needed but two are designed to protected against failure
Summary – see County / Applicant Agreement App 1

- County has withdrawn its objection to the land use form – PC should consider NCU application
- The county agrees the proposal should be approved, but county asks that we put on evidence to enable the PC to also be comfortable
- The county and applicant recommend approval of the proposed replacement toilet
  - Toilet is a lawful NCU/structure
    - Its replacement is maintenance as necessary to comply with DEQ requirements
    - Nature and extent of pit toilet was that it must be rebuilt and moved around because soil fills in and it fills with waste
    - New toilet can stay put
- The proposal is a required repair to comply with DEQ requirements – required to be allowed by state law
- County and applicant recommend the PC confirm that the fishing cabin and fishing recreation use of the property is a lawful nonconforming use.
- Evidence shows that both were lawfully established before zoning restrictions imposed on the property (no dispute first zoning is 1971)
- Fishing cabin with camping, eating, using outhouse on Subject Property since at least in 1971 – before zoning applied.
- Nature and extent in 20 year look back (1996 to date) is the same then and now.
Applicant Has Agreed, if Approved, Willing to Accept Condition no Commercial Use

• Some of the evidence to submit goes both to commercial and personal use - cannot easily be separated

• Our focus today will be on demonstrating the county recommendation of approval of the personal use of the subject property with a fishing cabin is a lawful nonconforming use and the toilet is a lawful part of that use.

• Reserve the right to rebut commercial use if needed – if comm use becomes an issue - and demonstrate there is a lawful nonconforming commercial use; but as noted willing to accept a condition that the use of the property, cabin and outhouse be limited to a personal use unless subsequent decision on an application allows commercial use
Personal versus Commercial Use  
(from emails with county attorney and agreement sheet App 1)

• Personal use means: “that the owners of the property could use it and could permit friends and family to use it either with or without the owners being present.”

• Commercial use means: use of the property for “compensation of any sort, including reimbursement of costs/expenses from non-owners to the owners. Staff's position is that the exchange of money is a commercial use and as a practical matter this is the only way to ensure compliance. No use could be sponsored by any commercial fishing guide service. No advertising of the cabin or property for use.”

• Applicant agrees to observe these definitions
Nonconforming Uses 101

1. Establish the use was “lawful when established” or before restrictive zoning applied – before 1971.

2. Establish what the nature and extent of the uses was in the 20 year period before the land use application was filed.
   - Thus the question is ‘what was the nature and extent of the use of the subject property in 1996 through today?’
A lawful NCU is required to be allowed to continue

• ORS 215.130(5) requires:
  “The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued.”

• ORS 215.130(5) also says:
  “a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use.”

ORS 215.130(11) says:
For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application.
Clarification of staff report

At p 7 Staff Report says: “In order to demonstrate a legal non-conforming use, the applicant would have had to provide evidence of (1) lawful establishment, and (2) the continual commercial use of this since establishment * * *”

• This statement is mistaken.

Reeder v. Multnomah County, 59 Or LUBA 240, 248-49 (2009): “ORS 215.130(11) prohibits counties from requiring that an applicant for a nonconforming use verification prove the ‘existence, continuity, [or] nature and extent’ of the nonconforming use more than 20 years prior to the date of the application. [N]ature and extent’ are listed separately from both ‘existence’ and ‘continuity, and all three matters are clearly subject to the prohibition. * * *

“To give effect to the language of ORS 215.130(11), the county can require the applicant to prove the ‘nature and extent’ of the use only for the 20 year period preceding the date of application. Thus, evidence that the nonconforming use was, for example, expanded 25 years prior to the date of application without obtaining required approvals would not be a basis for the county to refuse to verify that expansion in determining the nature and extent of the nonconforming use. As a practical matter, that means that any expansions that the applicant demonstrates existed 20 years prior to the date of application are a part of the ‘nature and extent’ of the nonconforming use, even if evidence is available indicating that those expansions were made without required approvals more than 20 years ago but after the use became nonconforming.”
Property History – Fishing cabin lawful before 1971 zoning came into effect

• No land use rules prohibited a fishing cabin in 1932 when it was established
• No land use rules applied to property at all until sometime in 1971
• By then (1971), the evidence is undisputed there was a fishing cabin and outhouse on the subject property
RR Lease of the fishing cabin since 1932

• Staff report mistakenly states 1983 was date of fishing cabin lease
• 1983 document is a transfer of 1932 lease/expressly states property was leased first to Dr. Shorts (1932) then to Ray Coffield (1950)
Confirmed by Kangas Family Logs for Subject Property

6/21/83

Wes Kangas & Bill Bell acquired the Cabin in June of 1983. They have been coming to “the cabin” with Ray Cofield since 1972, who purchased “the cabin” along with Tim Pelley from Dr. Short out of New Mexico for the Railroad in Wishram. Dr. Short had “the cabin” prefaced in Wishram & moved it to its present site by R.R. in 1932. The cabin was...
Indefinite Lease specific for a fishing cabin specifically was then assigned by RR again in 1983 to Kangas and Bell

**June 8, 1983**

Mr. Wes Kangas  
710 Elm Drive  
Goldendale, WA 98620

Dear Mr. Kangas:

This refers to your letter of May 23, 1983 concerning transfer of Lease OT L-474 in favor of Raymond C. Coffield covering a site for a fishing cabin at Lena, Oregon.

We have enclosed an application to be completed in order that the lease may be transferred to you and Mr. William G. Bell. Please fill out questions one through twelve using a typewriter and forward it to our Division Superintendent, Mr. R. J. Seeley, P. O. Box 571, Portland, Oregon 97207. It should be accompanied by a letter from Mr. Coffield releasing his interest in the lease site, his copy of Lease OT L-474 or a copy of the Bill of Sale for the improvements on this site.
Same Property in RR Lease and RR Sale Transaction

Subject Property is same as the subject of the “Indefinite Term Lease”

And is the same as the property that was sold by RR to Applicant’s predecessors (Kangas) who were also the transferees of the RR lease.
5. I have visited or observed the Subject Property in every year since 1971, either in connection with fishing, recovery or rescue efforts or in connection with jobs I’ve had. For example, in 1973 and for a few years after, I also observed the Subject Property when I worked for Wasco Electric REA reading electric meters monthly above Maupin, including in the area of the Subject Property. The Subject Property did not have a meter, but property around it did.

6. I observed a fishing cabin and an outhouse on the Subject Property from 1971 to this day. I cannot recall a year when there was not an operating fishing cabin and an operating outhouse on the Subject Property.

Mark is here to testify in person to these matters. He has no stake in the outcome.
6. I observed a fishing cabin and an outhouse on the Subject Property from 1971 to this day. I cannot recall a year when there was not an operating fishing cabin and an operating outhouse on the Subject Property.

7. The outhouse on the Subject Property was used by the owners, their guests and river guides with the owners’ permission – as well as friends who either had, or knew where to find, the key. I knew where the key was since at least 1974. Still do.
Confirms Historic Used the Subject Property Like Owners Have

- Declaration of Mark Angel

8. The Subject Property was used by many people from at least 1971 to date. In the 1970s and forward the Subject Property was used both by the owners and their friends but also by river fishing guides, and at least one scenic guide, through agreements with the owners. The guides and their customers stayed on the Subject Property. I observed tents, them eating there and, as noted, I know they used the outhouse. In this regard, in these early years from 1971 on, I recall seeing fishing guides Norm Wood, and Oscar Lang, and Scenic Guide Ray Dunnigan staying on the Subject Property with their customers.
Use of Subject Property – Kangas Logs App 5 and 5A

• 1996:

Aug 9-11 BB, Bud Elston, & 12 party rafting crew (McNab, Swift, Erdman, Moss, Schattuck, Morrison, Link, Svendsen, Brink, Hauan, Hudson, Dressel). Good time had by all. Fishing very slow. Big fire over hill to the south, filled valley full of smoke around cabin.
8-16-96 W.S. + MARY: Warm spring fire on Mutth Mountain. River closed to all rafters, just open for land owners. Drove pick-up to Dant. Helicopters were dumping water and fire crews were above old mine. Dick Thompson and Dan Morgan came up on Tuesday pm. Weather been pleasant - cobbled off to 42°F at night. Wind blew hard Saturday and Sunday night (8-17/18). Dicked hooked a steelhead across from Caretaker Cabin Tuesday pm, Jordan sworn across the river twice - Wednesday pm Wes caught hatchery steelhead on lure. Hit fly three but didn’t hook, then brings – No more fish. Wes
1996

10-7-849: Greg Roward 738 Bill caught one steelhead in front of cabin & lost another on tues. That was the only strikes I had. Greg had a couple hits but didn't hook anything. Merle Himmeren, a guest, showed up Wed. morning with 4 drift boats. Gave me a couple flies. Seemed like a nice guy. Said he had spoken to Wes before. Wanted to have lunch by our place. Nice weather. Too nice.
Kangas Logs 1997

5-23 Thur 5-29-97 - Wea: Mary, Qdefort Jordan -
Memorial Cold and
Day Week End. - not many craft. Weather
Fishing
Diosk
Fishing better, but fairly slow. Rain
a lot, but warm. Yes, Started. Wea

WEATHER
Kangas Logs 1997

Wed & Bill
4/21 - 4/23/97 First trip of 97 - cleaned up from the winter flood. No damage to anything. River a little high - fishing fair - too many steelhead smolts but caught a couple nice redsidees. A little rain late afternoon and evening. Monday & Tuesday. Made for good sleeping.

Cabin was in fine shape. No breaking & no mouse activity. River high but clean. Fishing pretty slow. Caught 2 trout & 2 whitefish. Pretty cool at night and in the morning but warmed up pretty good during the day. Lots of train activity the night of 2/26 (4 or 5 trains came by). Had a good time.
May 26th - West Vntus, Scott, Steph, Tony & Paula arrived at noon on Saturday. Brought "Chaco" & "Dakota." Dogs ran & ran. Weather just right, but turned cool and cloudy on Monday. Not very many rafters for 3 day weekend. Quite a few drift boats. Amtrak was running thru here as usual. Five in Albany had trains routed this way. Fishing slow - Hatch just started - about 2 weeks late. No snakes.
Aug. 27-29. Ken Schattuck & Bill Group of rafters from Id. spent night Sat. 10 in all. Seemed to be good guys. Didn’t fish much, caught a few trout. Hot! Step in boat Sat. night because cabin was too hot. One snake spotted by one of the rafters on trail to Nick’s. Didn’t get it.
April 28-30, 2000  Troy Matheny, B. 115 nephew, & B. 11
32° in cabin Sat. Morning - 46° Sun.  Got pretty warm
Sat. Cut grass, put up new rod holders and new screen door.
Fishing fair - lats of salmon and/or steelhead smolts 8" & 9".
Got a couple nice redside in front of Vick's and Troy caught
a nice one in front of our cabin. Saw no one on the river
except three walkers on other side. Didn't bring truck up
so didn't see gate keeper.
Aug 12-13 - Shettuck, Cosner & Bell - Came up to be there where the bunch of Gd! Raplers came down & spent night. There were 12 of them. Didn't fish much. Had a good time.
5/4-5/6/2001 Shattuck & Bill - Cabin was full of mice. Some SOB stole our gas, chowed some from boat to now grass.
Kangas 2001

6-22 to 6-25 Bill, Steve Ritchie, Dennis Sager & Bruce Lorenz.
Very hot when arrived but wind came up and blew most of night.
Fished only a little Fri. night. Caught small ones in front of cabin.
Fishing slow Sat. Lots of wind. Nick came up & had dinner
with us. Started raining Sunday about 6:30.
4/14/02  Bruce, Larry & Bill
River high. Most places unfishable. Did manage to catch a few. Some nice redsides 14”-16” but only three. Even the smallies weren’t biting. This is all through Thurs. noon. The evening reported. Went to follow. Cut the town, burned the brush pile and rested. Bruce is good company and good help. Heard a buck and 2 does on RR tracks this morning. (Thurs.) Evening report. Wind & Wind & F - it.
Same through selling to Taylor Garaths in 2012 – See App 5 and 5A

• Never a break
• Always the same
• Fishing, sleeping, camping in cabin and out, eating, resting, outhouse
Use of Subject Property

• Declaration Taylor Geraths
  
  unequivocally say that from 1996 to present the Subject Property has been used in every year without interruption for commercial guides participating in the activities listed in Paragraph 8.

• Taylor was clearly familiar with Kangas – first name basis in logs and became his partner

March 2012 Taylor bought 4970

Apr 9 Spring – West & Ordell
Taylor AND Dad Came
June Hal & Wes
• Use was then lawful when established – both fishing cabin / related fishing recreation use of subject property and outhouse

• Next question is: what is the nature and extent of that lawful NCU?

• Remember this is measured from April 1, 1996

• No dispute that the nature of the existing outdoor pit toilet is that it fills up (dirt, waste) and must be moved. That is part of its nature and extent. Thus, the fact that a single pit toilet exists on the property and is moved around the property consistent with its nature and extent is not a basis for denial or conditions.

• From Kangas Logs:

10-3-01 Went home - dug new shitter hole
6. The historic nature of the outhouse is that it moves around the property because it serves a pit toilet that fills up due to use or soil intrusion necessitating its occasional relocation on the property.
13. There has always been a pit outhouse on the Subject Property; there has never been a time in the period I was asked to comment on (between 1996 to date) when a pit style toilet was not located on the Subject Property and the pit toilet on the Subject Property was in every single year 1996 to date used by visitors to the Subject Property.
Outhouse – Rick Garaths

5. I have spent a great deal of time fishing the Deschutes River in the area of the Subject Property since 1976.

4. I remember when I first saw the Subject Property in 1976. I remember observing the cabin and the outhouse. The property had a power boat in front of it. I thought it was the most wonderful piece of property and wished someday that I could own something like that.

5. I observed the fishing cabin and an outhouse on the Subject Property in every year from 1976 to this day.
Kangas Logs 1996-2012 Consistent

• Property used in every year as a fishing retreat
• Cabin used every year
• Pit toilet used every year
• Camping for large and small groups, eating, resting, fishing, all occurred on the subject property continuously during the 20 year “lookback” period
2012-present consistent

• Property used as a fishing retreat
• Cabin used every year
• Pit toilet used every year
• Camping for large and small groups, eating, resting, fishing, all occurred on the subject property continuously during this period
NCU / NCS Summary

• Fishing Cabin Use – lawful when established in 1932 and before and in 1971
• Outhouse – lawful when established at least by 1971
• Fishing, Camping, Eating, Resting – before zoning ever applied
• Personal and Guides used – Part of nature and extent of NCU
• No lack of continuity for outhouse or fishing cabin etc. use –
• Nature and Extent – outhouse moved around to new pit hole when previous hole filled up with caved in dirt/waste
Lawful Parcel

- County properly agrees that the Subject Parcel is either lawful because it is a discrete parcel
- Or
- The applicant is of Tenant in Common with RR.
- We note the parcel can also be determined to be lawful under ORS 92.176(3).
- Either way, there is no illegal partition problem.
- Parcel is lawful.

KELLINGTON LAW GROUP, PC
Lawful Parcel Because Surplus RR Property

• Under Federal Surface Transportation Act, RR allowed to sell off unneeded property.

• 1996- authority to govern railroads was transferred to the Surface Transportation Board. STB - exclusive authority for determining unneeded and sale of RR property per 49 USC 10501(b)(2).

• Requiring RR to only sell its unnecessary property in 160 acre chunks if the blessing of local government is obtained, would mean RR could never dispose of unneeded property without also disposing of needed property.

• This would be contrary to the federal law governing the STB and railroads.

• Therefore, it is certainly plausible that subject property is legal parcel under federal preemption of right for RR to sell off unneeded land.
Or Held as Part of RR Holdings

• If RR can only sell its surplus property if it also sells its needed property in order to comply with land use rules,
• Then the worst case is property is held by the applicants as a tenant in common with the RR.
• Either way, staff is correct that subject property is lawful parcel
Regardless ORS 92.176(3) allows approval of replacement toilet

“3) A county or city may approve an application for a permit, as defined in ORS 215.402 or 227.160, respectively, or a permit under the applicable state or local building code for the continued use of a dwelling or other building on a unit of land that was not lawfully established if:

• (a) The dwelling or other building was lawfully established prior to January 1, 2007; and

• (b) The permit does not change or intensify the use of the dwelling or other building.”
Under state law and the local law which implements state law

• Lawful parcel issue – does not stand in the way of determining lawful NCU or from issuing the incinerating toilet permit.
An NCU and an NSC is a permitted outright use of property

• Clarify that under state law NCUs are permitted land uses

“In sum, a person has a right, pursuant to subsection (5) of ORS 215.130, to continue a nonconforming use of land, so long as that use was lawful before a change in zoning made that use nonconforming.” Lawrence v. Clackamas County, 180 Or App 495 (2002).

• Obviously, permitted uses are not prohibited.
There is no “trespass” that is a fiction created by a competing property owner

• Govt Lot 7, relevant parcel in this matter, created by governmental survey dated June 30, 1883.
• RR ROW was formed first, by a Congressional Grant under “Oregon Trunk Railway Act of March 3, 1875”.
• The N. easterly boundary was formed by the Deschutes River.
• Review of RR grant and Wasco Co assessors map which reflects the location of Deschutes River at time, shows river was the north and eastern most line of the ROW at that time
Note purple line on assessor’s map (App 10)
So what is the alleged “trespass” issue?

• At issue is legal question of who owns the land, which used to be river, but which by accretion – the slow and natural movement of the river – became useable land?

• Remember, at the time of the RR grant the NE boundary of grant was the river

• Out of state owner claims that when the river moved, he got to own the land and cut off the applicant’s only access.
  • Perhaps that is the way the law works in complainant’s state of California

• But in Oregon means one of two things – the land either accreted to the ownership of the Applicants or to the RR, but not to the out of state complainant.
Oregon Law (See App 9 Applicant’s Materials)

• No land between the RR grant and river at time federal RR grant

• In such circumstances case law establishes the RR deed to current owners carried with it accreted area

• And if not, then the accreted area would belong to the RR and not to out of state owner
Purple is Location of river at time per assessor records. Which keep tract of accretion for exactly this reason. Please note that the river is NE boundary of subject property.

Out of state owner asserts that he can claim Applicant’s property as a bonus from accretion and cut off the Applicant’s only access. But that is not the way the law works in Oregon.
Other things that should make clear there is no “trespass” here

• In Oregon, regardless of well-established principles that they own their land via accretion (and good manners);
• The applicant also has at a minimum a prescriptive access right to get to their property;
• Principles of adverse possession would give Applicants a continuing right to their property.
Regardless, County and Applicant Agree PC Does not Have to Resolve the Complainant’s Trespass Claim

• To approve the proposal, the county and PC need not address complainant's “trespass” claim;
• That is what circuit court’s are for;
• If Complainant really thinks there is trespass, he can bring an action to attempt to so prove;
• Complaint’s position is unlikely to meet a warm reception from an Oregon judge.
Bottom Line County and Applicant Agree that the Application Should be Approved...

1. The fishing cabin and its outhouse are either outright permitted lawful nonconforming uses or currently outright permitted uses (and structures)
2. Part of the nature and extent of the lawful NCU/NCS is that the outhouse fills with soil and waste and must be moved around the property
3. State law says the owners are entitled to maintain and repair an outhouse on the Subject Property; they are also entitled to bring it into compliance with state law
4. The Subject Parcel is a lawful parcel either because the RR has a federal right to dispose of its surplus property in increments it needs and federal preemption prohibits the county from foreclosing the RR from doing so unless in increments greater than needed (160 acres or more) or if parcel is not lawfully created, that just means Appellants are T in C with RR
5. And regardless, the incinerating toilet permit must be issued because the underlying use is lawful under ORS 92.176(3)
6. Trespass is a nonissue here
7. Applicant willing to accept a condition of no commercial use of the property as term is defined in App 1
8. If the county prohibited use of the property including prohibiting repair of outhouse, there is no economically viable use of the property left and the County would unconstitutionally take it without just compensation in violation of the 5th Amendment to the US Constitution and Article 1 Sec 18
Questions?

Thank you for your time and consideration